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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 122

MARTIN A. JORDAN and VIOLET E. JORDAN, his wife, and JAMES F. McMICKEN and DOROTHY McMICKEN, his wife, *Appellants*,

v.

VILLAGE OF MENOMONEE FALLS, *Appellee*.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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INDEX

	Page
ARGUMENT	1
A. The taking of private property for public use without payment of just compensation	1
B. Denial of equal protection	2
CONCLUSION	4

CITATIONS

Atchison, Topeka & S.F. Ry. Co. v. Public Utilities Com., 346 U.S. 346	4
Block v. *Hirsh*, 256 U.S. 135, 156	2
City and County of Denver v. *Denver Buick, Inc.*, 141 Col. 121, 347 P.(2) 919	2
Jenad, Inc. v. *Village of Scarsdale*, 23 App. Div.(2) 784, 258 N.Y.S.(2) 777 (Second Dept.)	2
Kansas City S.R. Co. v. *Road Improvement District*, 256 U.S. 658	4
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393, 415	1
Semmes v. *Tile Layers Protection Union*, 301 U.S. 468	4
Zucht v. *King*, 260 U.S. 174, 176-177	5

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No. 1293

MARTIN A. JORDAN and VIOLET E. JORDAN, his wife, and JAMES F. McMICKEN and DOROTHY McMICKEN, his wife, *Appellants,*

v.

VILLAGE OF MENOMONEE FALLS, *Appellee.*

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

ARGUMENT

A. *The taking of private property for public use without payment of just compensation.*—In seeking dismissal of this appeal, Appellee (its Br. pp. 4-9) mistakes the nature of this aspect of the appeal. The question presented is not whether a municipality may validly exercise its power to make provision for its parks and schools. To argue the negative of that question would indeed be frivolous.

But the question here is whether in making provision for parks and schools by requiring land dedications or equalization fees, the municipality is taking private property for public use without payment of just compensation. See *Pennsylvania Coal Co.* v. *Mahon,*

260 U.S. 393, 415; *Block* v. *Hirsh,* 256 U.S. 135, 156. The substantial nature of that federal question is shown by the fact that the decision here of the Wisconsin Supreme Court squarely conflicts with decisions in Illinois, New York, and Colorado, and cannot be reconciled with decisions on closely related questions in Pennsylvania, Michigan, Kansas, Oregon, Illinois, New Jersey and California. For detail, see our Jurisdictional Statement, pp. 12-13. We add but one comment. Appellee (its Br. p. 12) observes that the New York decision[1] against its contentions "had an interesting and well-reasoned dissent"; and the Appellee further observes that the Colorado decision[2] against its contentions "was arrived at only after several vigorous dissents and some thirty-five (35) pages of opinions." These observations but emphasize the substantial nature of the federal question we present. The dissent from the decision below does the same.

B. *Denial of Equal Protection.*—Appellee's argument on this aspect of the case is not supported by citation of a single decision. There appear to be but three decisions directly in point—the decision under review on this appeal, and two others which both hold the exaction of a payment in lieu of land dedication to be invalid as a denial of equal protection. See Jurisdictional Statement, p. 15.

Appellee (its Br. p. 10) admits that land dedication or equalization fees are not exacted of those now selling residential lots on land subdivided before passage of the ordinance in question here. To do so, says Appellee "would be to take property without due process of law

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[1] *Jenad, Inc.* v. *Village of Scarsdale,* 23 App. Div.(2) 784, 258 N.Y.S. (2) 777 (Second Dept.).

[2] *City and County of Denver* v. *Denver Buick, Inc.,* 141 Col. 121, 347 P.(2) 919.

in violation of the very Amendment under which they [Appellants] claim protection." This concession goes a long way toward sustaining our position that the ordinance requires the taking of private property for public use without just compensation.

Appellee (its Br. p. 10) sees no discrimination in taking land or equalization fees from subdividers of residential sites while none is taken from subdividers of industrial and business sites—because "it is the employees, not the businesses who use the parks and schools." But that reason, to use Appellee's characterization, "overlooks" the obvious fact that new jobs in business and industry attract new residents who use the parks and schools.

Appellee (its Br. p. 10) suggests that any discrimination by the ordinance against the newcomer in favor of the older residents is balanced by the "discrimination against the older residents in having their schools and parks overcrowded and depreciated by a hoard [sic] of newcomers." Such balancing of two discriminations presents a serious question of denial of equal protection.

Appellee (its Br. p. 10) admits that no land dedication or equalization fees are required of a land developer who, without subdivision, builds and rents a number of single-family dwellings. This discrimination in favor of such land developers and against Appellants, Appellee excuses on the irrelevant ground that "much the greater number of newcomers are in search of, and much the greater part, if not all of the Village, is zoned for single family residence."

Appellee (its Br. p. 10) argues that "appellants complain as though they were being required to pay the entire expense" of schools and parks "forgetting the part already contributed by the older residents." This

"overlooks" the fact that Appellant's land has continuously already borne its share of "the part already contributed by the older residents." Yet Appellants are called upon to make a second contribution not required of other "older residents."

Appellee concludes its argument on equal protection as follows (its Br. p. 11):

> Since the law dealt only with the division of land, it could not deal with rental or multiple housing problems. Among subdividers, no greater equality of treatment can be imagined. By requiring dedication in terms of the value of land or equalization fee at subdivider's election, all questions of political favor or favoritism are avoided, and all differences among parcels of land reduced to one common denominator, i.e., its fair market value.

We comment first that equal protection requires equal treatment of those who are in substance equally situated; second, that denial of equal protection to us is not disproved by showing that other subdividers of residential sites are also discriminated against; and third, that avoidance of political favoritism is beside the point, for laudable as that objective may be, Appellee must find constitutional ways of achieving it.

CONCLUSION

Here, as Appellee concedes, the validity under the federal Constitution of a state statute (the Village ordinance) was drawn into question, and the highest court of the state sustained such validity. In these circumstances, an appeal will not be dismissed,[3] unless

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[3] *Semmes* v. *Tile Layers Protection Union*, 301 U.S. 468; *Kansas City S.R. Co.* v. *Road Improvement District*, 256 U.S. 658; *Atchison, Topeka & S.F. Ry. Co.* v. *Public Utilities Com.*, 346 U.S. 346.

the questions presented are frivolous or settled by this Court.[4] Far from being frivolous, the questions here are substantial, as shown by this discussion and our Jurisdictional Statement; and we have not found, and Appellee does not cite any decision of this Court which settles them. The Motion to Dismiss should be denied, and probable jurisdiction noted.

Respectfully submitted,

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[4] *Zucht* v. *King*, 260 U.S. 174, 176-177.